IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORIGINAL SIDE

WRIT PETITION NO.1165 OF 2001

The Indian Seamless Steels and Alloys Ltd. & anr. ..Petitioners.
Vs.
Rajendra Darda, (Hon'ble Minister of State (Energy)
Government of Maharashtra & Ors. ..Respondents.

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Mr. D.J. Khambata i/b Mulla & Mulla and Craigie Blunt & Caroe for the Petitioners.
Mr. P.P. Chavan for Respondent Nos.2 to 4.

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CORAM : DR.D.Y.CHANDRACHUD, J.

21st July, 2004.

ORAL JUDGMENT :

1. In June 1993 the First Petitioner established a mini alloy steel plant at Jejuri in the District of Pune and commenced production. On 3rd April, 1993 an agreement was entered into with the Maharashtra State Electricity Board for the supply of power. The Second Schedule to the agreement set out the Conditions and Miscellaneous charges for the Supply of Electricity. Condition 20(c)(vii) provided thus :

> "20(c)(vii) In the event of the meter being out of order for any reason during any month, the consumption for the month will be determined on the basis of the average consumption over the preceding three months period, and the bill for the month will be prepared accordingly and become payable by the consumer. However in the case of the consumers billed on quarterly or six monthly period basis, the consumption during the period when the meter is out of order will be the same consumption made by him during the preceding quarter/six months period

respectively. The faulty meter will be replaced by another one in good working order immediately or the same will be replaced and reinstalled as expeditiously as possible. In case the meter belongs to the consumer, the consumer should get his meter repaired and tested by the Board by paying the standard charges, or by any other approved agency. Till that period the Board will install its own meter to record the consumption for which the consumer shall have to pay the monthly standard

rent."

2. According to the Petitioners, on 7th February, 1995, the Capacity Voltage Transformer (CVT) of the Y Phase connected to MSEB's meter started to fail gradually. In addition to the meter which had been installed by MSEB for recording the consumption of electricity, the Petitioners claim to have installed their own check meter and a comparison of the readings between the meter installed by the Petitioners and that installed by MSEB showed a gradual failure of the meter that was installed by MSEB. On 27th March, 1995 the officers of MSEB measured the voltage at the terminal lock of the meter and found that the Y phase of the CVT had been rendered faulty. On the basis that there had been a total and complete failure of the Y phase during the period 7th February, 1995 and 13th April, 1995, MSEB assessed the consumption of electricity at 1,50,70,000 units instead of a recorded consumption of 75,35,000 units and raised a bill in the amount of Rs.2,00,70,056/- on 4th April, 1995. The maximum demand was assessed by MSEB for the period between

February and April 1995 on the basis of the average monthly demand recorded during the succeeding period of three months and charges were levied on that basis.

3. On 18th June, 1996, the Petitioners raised a dispute before the Electrical Inspector under Section 26(6) of the Indian Electricity Act, 1910. The Electrical Inspector decided the issue by an order dated 3rd September, 1998. In his order, the Electrical Inspector came to the conclusion that the output voltage of the CVT had only gradually declined and had not suddenly dropped to zero. At this stage, it would be necessary to note that there was a dispute between the parties as to whether the meter had failed in its entirety and had completely stopped recording the consumption of electricity. According to MSEB, the meter had totally failed whereas according to the Petitioners the meter had gradually failed to record the correct consumption of electricity. The Electrical Inspector noted that a comparison between the consumption recorded on the meter installed by MSEB and the meter installed by the Petitioners showed a steep

increase in the difference between what was recorded in the two meters over a period of time. The Inspector determined that the period of fault was from 7th February, 1995 and 13th April, 1995 when the CVT came to be replaced by MSEB. The Electrical Inspector accordingly proceeded to make an estimate of the consumption of electrical energy and of the maximum demand. In so far as the consumption of electricity was concerned, the Electrical Inspector accepted the case of MSEB that the meter which had been installed in the premises of the Petitioners had been found to be 2.39% slow in September 1995 and assessment of electricity was made on that basis. In so far as the maximum demand was concerned, the Electrical Inspector adverted to the provisions of Clause 20(c)(vii) of the Conditions of Supply and took the average of the consumption recorded for a period of three months prior to February 1995 and three months subsequent to April 1995.

4. The order passed by the Electrical Inspector was challenged by the MSEB in an appeal before the State Government.

In appeal, the Minister of State (Energy) rendered his decision on 24th March, 2000. The Appellate Authority assessed the consumption of electrical energy at 1,40,15,000 units in place of the 1,25,26,034 units assessed by the Inspector. The maximum demand calculated by the Electrical Inspector was, however, confirmed.

5. The order of the Appellate Authority was challenged by the Petitioners in a petition before this Court under Article 226 of the Constitution (Writ Petition 1041 of 2000). Two submissions were urged before this Court : (i) that the provisions relating to the Conditions of Supply, in the agreement dated 3rd April, 1993 were binding and enforceable in law; under Condition 20(c)(vii) in the event that any meter was out of order for any reason during the period of any month, the consumption was required to be determined on the basis of the average consumption over the preceding three months' period and the bill for the month was liable to be prepared accordingly. The contention of the Petitioners was that neither the Electrical Inspector nor the Appellate Authority had applied Condition

20(c) (vii) in estimating the electrical energy consumption; (ii) The Appellate Authority had adopted a multiplier for enhancing the consumption of electrical energy on the basis of a test carried out by MSEB unilaterally and which had not been accepted by the Petitioners as correct. This Court in its order dated 16th May 2000 noted that while the Appellate Authority had held that it was not open to MSEB to assess the average consumption unilaterally and such an assessment had to be carried out by the Electrical Inspector under Section 26(6) of the Electricity Act, 1910, yet at the same time the authority had proceeded to accept a multiplier on the basis of the test carried out by MSEB on 27th March 1995 without considering the objections of the Petitioners to the adoption of the multiplier. In so far as the other grievance was concerned, this Court noted the submission of the Petitioners that Condition 20(c)(vii) of the Conditions of Supply was valid and binding on the parties. However, the Court remanded the matter and therefore, left it open to the Appellate Authority to reconsider the contentions of the parties afresh. While remanding the matter it was clarified that in so far as the

maximum demand was concerned, both the Electrical Inspector as well as the Minister had rendered a concurrent assessment of 33,725 KVA which was undisputed. The Petitioners were, therefore, directed to pay the additional charges calculated on the basis of the said assessment without waiting for the decision of the Appellate Authority. The Petitioners were also directed to pay the charges for electricity consumption on the basis of the order of the Electrical Inspector since that had not been challenged by the Petitioners. Accordingly, with the aforesaid directions the matter was remanded back to the Appellate Authority.

6. The Appellate Authority has in pursuance of the order of remand passed a fresh order dated 9th March 2001 which is impugned in these proceedings. The Appellate Authority has accepted the contention of the Petitioners that there was a dispute regarding the correctness of the meter and hence, only the Electrical Inspector would have the authority to decide the electricity consumed during the disputed period under Section 26(6) of the Electricity Act, 1910.

The period of dispute, it has been recorded was 7th February, 1995 to 13th April, 1995. The Appellate Authority has also accepted the finding of the Electrical Inspector that the CVT had not failed completely, but had gradually given less voltage. In these circumstances, the Appellate Authority holds that the consumption of electricity cannot be determined unilaterally, but would have to be estimated by the Electrical Inspector under Section 26(6) of the Indian Electricity Act, 1910. The Appellate Authority, however, has declined to accede to the contention of the Petitioners in regard to the applicability of Condition 20(c)(vii) of the Conditions of Supply holding that the aforesaid condition shall apply when the meter is out of order, but that in the present case the meter was “not out of order”. The Appellate Authority has thereafter proceeded to estimate the electricity consumed by the Petitioners at 1,30,72,013 units on the basis of a multiplier of 1.73.

7. The order of the Appellate Authority is sought to be questioned in these proceedings under Article 226 of the Constitution.

Counsel appearing on behalf of the Petitioners has urged that there is an inherent contradiction in the order passed by the Appellate Authority. The Appellate Authority has accepted on the one hand the contention of the Petitioners that there was not a complete failure of the CVT, but only a gradual failure resulting in a progressively reduced consumption on the electric meter. In the circumstances, the Appellate Authority has on the one hand upheld the contention of the Petitioners that calculation of electrical energy would have to be computed by the Electrical Inspector under Section 26(6) of the Act and not unilaterally by MSEB. The Appellate Authority has also accepted the correctness of the computation made by the Electrical Inspector of the maximum demand, which is based on Condition 20(c) (vii) of the Conditions of Supply. However, when it comes to the assessment of electrical energy, the Appellate Authority rejects the applicability of Condition 20(c) (vii) on the ground that the meter was not out of order. This finding, it has been urged is ex-facie perverse. Counsel appearing on behalf of the Petitioners has urged that it was not open to the Appellate Authority to ignore the Conditions of Supply

since these have statutory force under Section 49(b) of the Electricity Supply Act, 1948.

8. The jurisdiction of the Electrical Inspector is circumscribed by the provisions of Section 26(6) of the Indian Electricity Act, 1910 which provides thus :

> "26.(6) Where any difference or dispute arises as to whether any meter referred to in sub-section (1) is or is not correct, the matter shall be decided, upon the application of either party, by an Electrical Inspector; and where the meter has, in the opinion of such Inspector ceased to be correct, such Inspector shall estimate the amount of the energy supplied to the consumer or the electrical quantity contained in the supply, during such time, not exceeding six months, as the meter shall not, in the opinion of such Inspector, have been correct; but save as aforesaid, the register of the meter shall, in the absence of fraud, be conclusive proof of such amount or quantity :

Provided that before either a licensee or a consumer applies to the Electrical Inspector under this sub-section, he shall give to the other party not less than seven days' notice of his intention so to do."

9. These provisions demonstrate that the primary condition for the invocation of the jurisdiction of the Electrical Inspector is that there should be a difference or dispute as to whether any meter is or is not correct. If there is in fact no dispute or difference as to whether the meter is or is not correct, the Electrical Inspector would have no jurisdiction in the first place. This is now settled by a recent judgment of the Supreme Court in Tata Hydro-Electric Power Supply Co.Ltd. v. Union of India ((2003) 4 SCC 172). Mr. Justice B.P.Singh speaking for a Bench of three Learned Judges held that when there is no dispute that the meter is defective, such a dispute is not one contemplated by sub section (6) of Section 26 of the Act. However,

upon any difference or dispute arising as to whether any meter is or is not correct, the matter has to be referred to and decided by the Electrical Inspector on the application of either party. Where the Electrical Inspector arrives at the opinion that the meter has ceased to be correct, he has to estimate the amount of energy supplied to the consumer or the electrical quantity contained in the supply "during such time not exceeding six months as the meter shall not in the opinion of such inspector have been correct". However, save as aforesaid, the register of the meter has to be the conclusive proof of such amount of such quantity, in the absence of fraud. These provisions have been interpreted in the judgment of the Supreme Court in Belwal Spinning Mills Ltd. v. U.P. State Electricity Board ((1997)6 SCC 740). The Supreme Court held that after the amendment of Section 26(6), the Inspector has been relieved of the duty to estimate the total quantity of energy supplied for the entire period during which the meter in the opinion of the Inspector shall not have been correct. The Supreme Court has held that the Inspector has a statutory duty to estimate the supply of energy for a limited

period referred to in sub section (6) viz., during such time not exceeding six months. Beyond the period of six months in the absence of fraud, the register of the meter has to be regarded as conclusive proof of the amount of electrical energy that has been supplied. The same principle has been reiterated by the Supreme Court in the subsequent judgment in Tata Hydro-Electric Power Supply Co. Ltd. (supra) wherein the Court held that based upon his finding the Electrical Inspector is authorized to estimate the amount of the energy supplied during such period, not exceeding six months as the meter shall not in his opinion have been correct.

10. In the present case, parties have been governed by an agreement setting out the Conditions and Miscellaneous Charges of supply that was entered into on 3rd April, 1993. Such an agreement has statutory force and effect. Section 49(1) of the Electricity (Supply) Act, 1948 provides that subject to the provisions of the Act and all regulations made in this behalf, the Board may supply electricity to any person not being a licensee upon such terms and conditions as

the Board thinks fit and may for the purpose of such supply frame uniform tariffs. The agreement between the Board and the Petitioners is, hence referable to the provisions of Section 49 of the Electricity (Supply) Act, 1948. In view of the judgment of the Supreme Court in M/s. Hyderabad Vanaspathi Ltd. v. Andhra Pradesh State Electricity Board (AIR 1998 SC 1715), it is now a settled principle that Section 49 of the Electricity (Supply) Act, 1948 empowers the Board to prescribe such terms and conditions as it thinks fit for supplying electricity to any person other than a licensee and the terms and conditions so prescribed are statutory in nature and cannot be regarded as purely contractual. The Supreme Court has held that an Electricity Board, in order to avoid a plea by the consumer that he has no knowledge of such terms and conditions, may enter into an agreement in writing but that will not make the terms purely contractual. The Board in the performance of its statutory duty supplies energy on certain specific terms and conditions framed in exercise of a statutory power.

11. In the present case, there was a dispute between the parties as to whether the meter is or is not correct. According to the Board, the meter had completely stopped functioning altogether with effect from 7th February, 1995. This was disputed at the earliest possible opportunity by the Petitioners who sought to contend that there was only a progressive decline in the recording of electricity consumption on the meter and that the contention of the Board to the effect that there was a total failure on the part of the meter to record consumption was not correct. This dispute was referred to the Electrical Inspector. The Electrical Inspector could not have ignored the provisions of the Conditions governing the Supply of Electricity that were statutorily provided for by the Board and spelt out in the agreement dated 3rd April, 1993. Condition 20(c)(vii) provided that in the event of the meter being out of order for any reason during any month, the consumption for the month will be determined on the basis of the average consumption over the preceding three months' period and the bill for the month will be prepared accordingly and shall become payable by the consumer. In calculating the maximum

demand the Electrical Inspector applied the provisions of Condition 20 (c) (vii), though perhaps in a modified form, in that he estimated the maximum demand on the basis of the average consumption during the preceding and succeeding period of three months respectively. Be that as it may, the issue relating to the maximum demand has attained finality since the order of the Electrical Inspector was not challenged by the Petitioners before this Court in the earlier round of proceedings. However, when it came to determining the electrical energy that was consumed during the disputed period, there has been a failure on the part of the Electrical Inspector as well as the Appellate Authority to apply the provisions of Condition 20(c)(vii). The order of the Appellate Authority has inherent contradictions. On the one hand, the authority accepts the contention of the Petitioners that there was a gradual failure to record electricity consumption during the period of dispute - 7th February, 1995 to 13th April, 1995 - and that accordingly the assessment of electricity consumed would have to be made by the Electrical Inspector under Section 26(6). Yet the authority holds that the meter was not out of order and hence

Condition 20(c)(vii) is not attracted. Condition 20(c)(vii) deals initially with a situation where the meter is "out of order" for any reason during any month. The words "meter being out of order" cannot obviously comprehend a situation only where the meter is totally and completely out of order, that is, where the meter records no consumption at all, but must necessarily include a case where the meter has progressively failed to record the correct quantity of electricity consumed. The reason on the basis of which the Appellate Authority has declined to apply Condition 20(c)(vii) is therefore specious. This was clearly a case where the meter was out of order since the meter was defective. Once the finding of the Electrical Inspector that the meter was defective is accepted, as it has been even in the initial part of the order of the Appellate Authority, the necessary consequence is that Condition 20(c)(vii) must be followed.

12. Section 26(6) of the Indian Electricity Act empowers the Electrical Inspector to decide upon a difference or dispute whether a meter is or is not correct. Where the Inspector comes to the

conclusion that the meter has ceased to be correct, the Inspector has to estimate the amount of energy supplied to the consumer "during such time, not exceeding six months, as the meter shall not in the opinion of such Inspector have been correct". The estimate that has to be made by the Electrical Inspector, therefore, is governed by two conditions. The first is that the estimate has to be in respect of such time as the meter has not been correct and second, that the estimate cannot be for a period exceeding six months. Save in the case of fraud, the register of the meter is conclusive proof of the electrical energy consumed beyond a period of six months. In the present case, since the parties are governed by the terms of the Supply agreement, the method or mode by which the estimate has to be made is that which is spelt out in Condition 20(c)(vii). Section 26(6) spells out (i) the condition for the invocation of the jurisdiction of the Electrical Inspector and (ii) the period of time for which the Inspector can render his determination once there is a dispute about whether the meter is or is not correct. In a case where parties are governed by the statutorily prescribed conditions under Section 49(1) of the

Electricity (Supply) Act, 1948, the mode of determination must be in accord with those conditions. Condition 20(c)(vii) requires the basis to be taken as the average consumption over the preceding three months' period. In the present case, both the Electrical Inspector as well as the Appellate Authority have failed to apply the provisions of Condition 20(c)(vii) and to that extent the impugned order warrants interference under Article 226.

13. At this stage, it would be necessary to deal with one of the issues which has been the subject matter of submissions before the Court. The period under dispute, it is common ground, is 7th February 1995 to 13th April, 1995. The jurisdiction of the Electrical Inspector under Section 26(6) is to make an estimate of the electrical energy consumed during such time as the meter has not been correct. The Electrical Inspector is, therefore, duty bound to make an estimate of the consumption during this period. Condition 20(c)(vii) provides that the consumption of the month will be determined on the basis of the average consumption over the preceding three months' period. The

consumption which has to be computed by the Electrical Inspector is for that period during which the meter is not correct under Section 26 (6). This is further clarified by the subsequent part of Condition 20(c) (vii) which spells out that for a consumer billed on a quarterly or six monthly period, the consumption during the period when the meter is out of order will be the same consumption made by him during the preceding quarter or six months' period. The Electrical Inspector can make an estimate of electricity consumed for the period during which the meter has ceased to be correct and not in excess thereof.

14. In the circumstances, this Petition will have to be allowed by setting aside the impugned order of the Appellate Authority to the extent to which the Authority computes the supply of electricity by the Petitioners at 1,30,72,013 units. Instead and in place of the order of the Appellate Authority, there shall now be a direction to the Electrical Inspector to compute the electrical energy supplied over the period between 7th February 1995 to 13th April, 1995 by applying the provisions of Condition 20(c)(vii) of the Conditions of supply as more

particularly elaborated in the earlier part of this judgment. Upon such determination being made, the Petitioners shall pay over the amount that may be demanded within a period of two weeks of the demand after due adjustment of the amount that has already been paid, if any. It is, however, clarified that the order of the Appellate Authority in so far as the issue of Maximum Demand is concerned is not disturbed since it has already attained finality as between the parties.

The Petition is allowed in these terms. There shall be no order as to costs..